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are bound to concede that of late there is an apparent tendency to the opposite rule.

VI. It has been strenuously contended that the mortgage should define on its face not only its purpose as security for future advances, but the limits of the advances or liabilities it is intended to secure, and Chancellor KENT seems to have entertained this opinion: 4 Comm. 176; but the weight of authority is strongly the other way, and it may now be considered well settled to the contrary; *Lyle v. Ducomb*, 5 Binn. 585; *Moroney's Appeal*, 12 Harris 372; *Shirras v. Caig*, 7 Cranch 34; *Craig v. Tappin*, 2 Sandf. Ch. 78; *Robinson v. Williams*, 22 N. Y. 385; *Collins v. Carlisle*, 13 Ills. 254.

J. T. M.

RECENT AMERICAN DECISIONS.

Supreme Court of Wisconsin.

WILLIAM J. WARNER ET AL. v. FREDERICK HEIDEN.

Where a husband charges his wife before a justice of the peace, with having threatened him with personal violence, and fails to sustain such charge, he will be held liable to the attorney of the wife, in an action brought to recover for services rendered upon her retainer.

Whether his presence when the services were rendered, and making no objection thereto, would make him liable on an implied promise to pay for them, *quære*.

APPEAL from the Circuit Court of Ontonagon county. The facts are stated in the opinion of the court.

The opinion of the court was delivered by

LYON, J.—It appears, by the complaint and evidence in this action, that the defendant prosecuted his wife before a justice of the peace, to compel her to find securities to keep the peace, pursuant to the provisions of chap. 175 of the Revised Statutes.

On his complaint, charging that she had threatened to commit personal violence on him, the justice issued a warrant for her arrest, and she was arrested and brought before such justice for examination.

Mrs. Heiden thereupon employed the plaintiffs, who are attorneys at law, to defend her upon such examination, which duty they performed.

The magistrate decided that the prosecution had failed to prove that there was just cause to fear that such threatened offence would be committed by the accused, and discharged her from custody. It further appears that Mrs. Heiden was living with the defendant, and was supported by him at that time.

This action was brought by the plaintiffs to recover of the defendant (the husband) the amount of their bill for services. It is admitted that the services were not rendered at the husband's request, and that he has never expressly promised to pay for them. The plaintiffs recovered judgment for the amount and costs of suit, which judgment was affirmed by the Circuit Court and from that judgment the defendant has appealed to this court.

The question to be determined is, whether the defendant is legally liable for the services of the plaintiffs rendered by them under these circumstances.

The husband is under legal obligation to support his wife, and nothing but wrongful conduct on her part can free him from such obligation. If he fails to provide her with suitable and proper necessities, any third person who does provide her therewith may maintain an action against him for the same: 1 Bishop on Marriage and Divorce, § 553. The same learned author, in the following section (sect. 554), thus defines what are necessities which the husband is bound to furnish to his wife:—

“And in general we may say that necessities are such articles of food or apparel, or medicine or such medical attendance and nursing, or such provided means of locomotion or provided habitation and furniture, or such provision for her protection in society, and the like, as the husband, considering his ability and standing, ought to furnish to his wife for her sustenance and the preservation of her health and comfort.”

This definition of necessities seems to us to be strictly correct, and unless the services of the plaintiff come strictly within it—unless they were *necessaries* within the meaning of the law—in the absence of any agreement by the defendant to pay for them, the plaintiff ought not to recover in this action.

Were the professional services of the plaintiffs necessities furnished to Mrs. Heiden for which the defendant is liable?

It is well settled, both in this country and in England, that where the conduct of the husband is such that it becomes neces-

sary for the wife to exhibit articles of the peace against him for her safety and protection, the husband is liable for the necessary expenses of the proceedings including attorney's fees. The leading case in England on this subject is that of *Shepherd v. Macone*, 3 Camp. 326; and in this county *Morris v. Palmer*, 39 N. H. 123, seems to be a leading case on the same subject.

Shepherd v. Macone was an action on an attorney's bill for business done on the retainer of the defendant's wife. It appeared that the defendant without just cause had turned his wife out of doors with circumstances of great violence, and that she exhibited articles of the peace against him prepared by the plaintiff.

The first part of the plaintiff's bill was for his services in preparing such articles. Lord ELLENBOROUGH said, "The defendant's liabilities for the first part of the charge will depend upon the necessity of exhibiting articles of the peace against him." * * *

"But if she was turned out of doors in the manner stated, she carried along with her a credit for whatever her preservation and safety required; she had a right to appeal to the law for protection, and she must have the means of applying effectually; she might, therefore, charge her husband with the necessary expense of this proceeding as much as for necessary food and raiment."

Morris v. Palmer, supra, was also an action upon an attorney's bill for services rendered on the retainer of the wife of the defendant in a prosecution instituted by her against her husband, and which resulted in an order being made by the magistrate before whom the proceedings were pending, requiring him to enter into recognisance for his good behavior. The defendant was held liable to pay the bill, and EASTMAN, J., who wrote the opinion, after stating the general principle of law, that the husband is liable for necessities furnished to the wife, says, "It appears to us that these principles, carried out, must make the husband liable for the necessary costs incurred in a prosecution against him upon complaint of the wife for a breach of the peace. It is as important that her person be protected from brutal outrage and violence, as that her necessary food and clothing should be supplied. Both are for her preservation, and her husband should be as much bound to fulfil her contracts in the one case as in the other." "The case of violence, however, would seem to be one of the greater necessity." (p. 126.)

All of the cases cited by counsel of defendant in their brief, with a single exception, are divorce cases, and all of them, I think, without exception, admit that the above cases of *Shepherd v. Macone* and *Morris v. Palmer* were correctly decided.

Now, if the husband is liable on the retainer of the wife to an attorney for professional services rendered by him in exhibiting articles of the peace against the husband (there being sufficient grounds therefor), it seems to us that he must be liable in like manner where the husband exhibits similar articles against her, and causes her arrest on a groundless charge. If the services of the attorney are necessities in the one case, we think that their character is the same in the other case.

The defendant had caused his wife to be arrested, and was endeavoring to compel her to find sureties to keep the peace, or in default thereof to send her to prison. He had made a charge against her which he was unable to substantiate; he had withdrawn from her that protection which it was his duty to give her, and had, without cause, put her in custody, and was endeavoring to use the machinery of the law to inflict upon her still greater evils.

True, he did not beat her with a club, nor lock her in a dungeon, but he deprived her of her liberty, and endeavored in a certain contingency to have her confined in the county jail for a period not exceeding six months, and this without cause. It is idle to say that under the circumstances of this case legal advice and assistance was not necessary for her protection and safety. And the same being necessary, and having been rendered by the plaintiffs, all of the cases hold the principle, and we now add another to the list, that he must pay therefor.

I am inclined to think that the action can be maintained on another ground. It was proved at the trial that the defendant was present when the services in question were rendered by the plaintiffs, and made no objection thereto.

The case of *Shepherd v. Macone*, *supra*, is an authority for holding that from such failure to object, a promise by the defendant to pay for such services may be fairly inferred.

In that case a part of the plaintiff's bill was for defending the wife upon an indictment against her for keeping a bawdy-house. Lord ELLENBOROUGH said, "With respect to the defence upon the indictment, as the defendant knew and approved of the busi-

ness his wife carried on, and was aware of the prosecution *without expressing any dissent to the plaintiff's defending her*, I think a promise may be fairly inferred on the part of the defendant to pay the plaintiff for his labor in conducting the defence."

We do not rest our decision, however, on any implied promise by the defendant to pay for those services, but put it upon the grounds above stated, of the husband's liability to pay for necessities furnished his wife, as long as she is free from wrongful conduct.

The judgment of the Circuit Court is affirmed.

When the court in the above case held that the attorney was entitled to recover for services rendered to the wife, because she was shown to have been *innocent*, and rested the liability of the husband upon that ground, though its decision may perhaps have been strictly in accordance with authority, it is certainly open to criticism on the ground of being opposed to the true principle, that every one is to be *presumed* innocent until proved guilty; and an attorney who in good faith undertakes the defence of a wife, if entitled to recover from the husband for his services, is justified in relying on that presumption of law, and should be held as so entitled without regard to the fact of whether the innocence of the wife is proved or not. If this is the true doctrine it follows that the above decision should not have been placed on the ground that the wife was *proved innocent* of the charge preferred.

If the husband is bound to pay his wife's counsel fees, on the ground that they are necessary for her protection in society, he should be held liable irrespective of the fact of her guilt or innocence; certainly in those cases where he is the party plaintiff, for whatever reason there may be for holding that an attorney who acts for a wife, when she is the plaintiff, must run the risk of determining whether her cause is meritorious; there can be none, where she is defendant, she being presumably inno-

cent, her attorney should be fully justified in looking to the husband for payment of his fees.

The true policy of the law and the dictates of justice demand that the husband and wife should stand on equal ground when they are parties litigant; and this can only be accomplished by holding that the wife has power to bind her husband for necessary counsel fees, otherwise she is denied substantial justice for being unable to contract for the payment of such fees herself, she must have the power to bind her husband, and it cannot be maintained at the present day, that counsel can be found who would be willing to expend their time and labor in the defence of a client's cause, if their only chance for remuneration depended upon establishing the innocence of such client to the satisfaction of a jury.

The cases in which a husband may be called upon to pay his wife's counsel fees, are properly divisible into two classes, those in which he is the party plaintiff, as the libellant in a suit for divorce, or the complainant in a case like the one in point, and those in which the wife is the plaintiff in similar suits; and it is in the former that her right to bind her husband should be unquestioned, she is as much entitled to necessary counsel fees to establish her innocence as she is to the necessities of life while it is being tried, and her right to

bind her husband for the latter cannot be disputed.

The authorities on the subject are extremely meagre; most of the cases where the question has arisen, have been suits for divorce, and in the courts having cognisance of such suits, their peculiar practice has enabled them to answer one great argument in favor of holding the husband responsible in *all cases*, namely, the argument of the impropriety of making the counsel of the wife the judge of the merits of his client's case, at the peril of losing his fees. For in the Ecclesiastical Courts in England, and in the Chancery Courts in this country, where such suits are generally if not always determined, the practice is to make an order in the very beginning of the proceedings for the payment of the wife's counsel fees where such order is deemed proper, and if this is refused, the counsel for the wife at least knows at the very outset upon what he has to rely, and the responsibility of determining the merits of the defence is thrown upon the proper person. Yet even these tribunals have apparently appreciated the distinction between cases in which the husband was the libellant or plaintiff, and those in which the wife was, and if they are shown to have inclined towards making the husband responsible whenever he was plaintiff, it furnishes an argument in favor of the doctrine contended for.

In *Bird v. Bird*, decided in 1753, and reported in 1 Lee 209, the bill for a divorce was filed by the husband on the ground of nullity, by reason of a former marriage by the wife; on an application for payment of the wife's counsel fees, Sir GEORGE LEE decreed that the husband should pay them. "I must presume," he says, "till the contrary is proved, that the wife is so *de jure* as well as *de facto*, otherwise she would be guilty of bigamy and a felon; but the law presumes her innocent until proved

guilty, and I will therefore presume her his lawful wife."

Again in *The Countess of Portsmouth v. The Earl*, 3 Addams 63, the bill of the husband charged fraud in the wife in procuring the marriage; it was nevertheless held that an order on the husband to pay the wife's counsel fees was proper, Sir CHRISTOPHER ROBINSON saying, "I am unable to distinguish this case from *Smith v. Smith*, in which the court refused to proceed until funds were provided to enable the wife to conduct her defence."

These were certainly strong cases for denying the right of the wife to have counsel fees, if such ever exist where she is defendant, and yet the court held such right to be undoubted, and evidently on the ground that she must be considered innocent until proved the contrary; then why should an attorney undertaking her defence be held to a stricter rule?

In *Brown v. Ackroyd*, 5 E. & B. 819, where a suit was brought by the proctor of the wife, to recover costs from the husband, incurred in prosecuting a divorce on the part of the wife against the husband, CAMPBELL, C. J., in his opinion says: "The rule is that the proctor must show that there was reasonable cause for instituting the proceeding," if there was not he cannot recover, and "I am of the opinion that no such reasonable cause has been shown." In this case the wife was the applicant for the divorce; and though the petition for the payment of her counsel fees was not made to the court in which the divorce was determined, as in the other two cases, it still shows that her counsel is held to a stricter rule than when she is defendant.

This was directly asserted by CHURCH, C. J., in *Shelton v. Pendleton*, 18 Conn. 417, where a suit was also brought by the wife's counsel to recover of the husband for services rendered in the prose-

cution of a divorce on the part of the wife. "When the wife," says the Chief Justice, "is respondent and defends herself against the application of her husband, the practice is uniform, in case of her inability, to order him to provide funds for her defence; but we have never known such aid to be furnished to her when she was the prosecuting party."

The principle of this case was followed in *Morrison v. Holt*, 42 N. H. 478, the court making the distinction between cases where the wife was plaintiff or defendant; and also in *Dorsey v. Goodenow*, Wright's Ch. Rep. Ohio 120, and *Johnson v. Williams*, 3 Iowa 97.

In *Phillips v. Simmons*, 20 How. Prac. N. Y. 342, where a suit was brought by the wife for a divorce and afterwards discontinued, in an action by her counsel to recover his fees from the husband, it was said that the wife cannot be considered the agent of the husband to commence an action against himself and make him liable to her attorneys for the costs; while an action is pending the wife in a proper case may obtain an order that the husband furnish her with means for carrying it on; but when she is plaintiff in such action her attorneys have no claim on him for the expenses—however, in *Wright v. Wright*, 1 Edwards's Ch. 62, the court made an order on the husband to pay the wife's counsel fees, although the bill for a divorce was filed by the wife; so also in *Murray v. Murray*, 1 Edwards 382, and previously in *Denton v. Denton*, 1 Johns. Ch. C. 365, and *Mix v. Mix*, 1 Id. 110. But the fact that the strict rule laid down in the above case of *Shelton v. Pendleton* has not always been followed, furnishes no argument for contending that the payment of the wife's counsel fees is ever refused where she is the defendant.

The present practice of the Ecclesiastical Courts seems to be in accordance with the principle laid down by KING, J., in *Melizet v. Melizet*, 1 Parsons 78,

and in favor of holding the husband responsible whether he is plaintiff or defendant; in this last case Judge KING says: "I am convinced that the husband, plaintiff or defendant, is obliged to pay the expenses incurred by his wife in prosecuting or defending a divorce. Otherwise, in many cases a wife being in poverty must fail in a just suit instituted by her, or be defeated in an unjust one prosecuted by her husband against her."

This appears to have been the ruling motive of Judge LEWIS in the case of *Graves v. Cole*, 7 Harris 171, where an action was brought against a husband to recover certain expenses incurred by his wife in defending a suit for a divorce. In his opinion the judge says: "The wife having no separate support must be subsisted and her necessary costs paid, pending proceedings for a divorce, otherwise she might be denied justice for want of the funds required for the vindication of her rights, and for this reason she may in general have her costs taxed *de die in diem*."

Now, while it is true that the foregoing authorities, being in cases of divorce, and mostly of courts having jurisdiction of the original suit, fail in that respect to expressly establish the rule, that in another action a husband will be held liable for professional services rendered to his wife, whenever she is defendant in an action brought by him; they nevertheless show very conclusively the strong tendency of the law in that direction, and being manifestly in accordance with the dictates of justice and the reason of mankind, would probably have a controlling influence if adverted to in future cases, in sustaining the doctrine that the husband must pay his wife's counsel fees in all cases in which she is defendant in an action brought against her by himself, and irrespective of the fact of her guilt or innocence.

W. WYNNE WISTER, Jr.